

NORTHWEST ENVIRONMENTAL ADVOCATES



July 23, 2013

U.S. Environmental Protection Agency
FOIA and Privacy Branch
1200 Pennsylvania Ave., N.W.
Washington, D.C., 20460

Via E-Mail only: FOIA_HQ@epa.gov

Re: **Appeal of Denial of Fee Waiver Request: FOIA No. EPA-R1-2013-008330 – AMENDED**

To whom it may concern:

On July 17, 2013, Northwest Environmental Advocates (NWEA) submitted a Freedom of Information Act (FOIA) request to EPA Region I seeking formal documents pertaining to EPA's actions or inactions on water quality standards submitted to Region I by the States of Maine, New Hampshire, Vermont, Connecticut, Massachusetts, and Rhode Island. The FOIA request included an extensively supported request to waive fees. On July 19, 2013 the fee waiver was denied on the basis that NWEA allegedly failed to demonstrate "a specific intent to disseminate the information to the general public." This determination was made by EPA despite NWEA's clearly expressed intent to disseminate the information to the public set out in the fee waiver request, leading us to conclude that EPA's denial of the fee waiver request is a form of harassment and contrary to President Obama's Executive Order on FOIA. *See* The White House, President Barack Obama, Memorandum for the Heads of Executive Departments and Agencies at <http://www.whitehouse.gov/the-press-office/freedom-information-act>. EPA then declined to evaluate any other aspects of NWEA's fee waiver but, even so, concluded that an appeal should "address all factors required by EPA's FOIA Regulations, located at 40 C.F.R. § 2.107(1)." It is our view that it is illogical to both not process our fee waiver in its entirety and to hold us to appeal a decision that has not yet been made. Nonetheless we will do so.

Before providing you with the information to support our appeal, we wish to make two points in response to your July 19 letter. First, your letter inhibits efficient resolution of EPA's concerns because it utterly fails to explain why you believe NWEA's fee waiver request is insufficient and what additional information you need to approve the fee waiver. EPA's summary denial letter was clearly not "reasonably calculated" to put NWEA on notice of the deficiencies in its case, as required. *Friends of the Coast Fork v. U.S. Department of the Interior*, 110 F.3d 53, 55 (9th Cir. 1997) ("the government's denial letter must be reasonably calculated to put the requester on notice as to the deficiencies in the requester's case"). In our July 17, 2013 FOIA request, NWEA specifically addressed each fee waiver factor. Your letter, on the other hand, stands in stark contrast – it is EPA's letter that lacks sufficient information, not NWEA's – and by doing so prevents NWEA from efficiently addressing issues about which you are ostensibly concerned.

Second, EPA's approach to NWEA's fee waiver request appears inconsistent with the requirements of the FOIA. Courts have consistently recognized that Congress intended the fee

waiver provisions to “be liberally construed in favor of waivers for noncommercial requesters.” See, e.g., *Forest Guardians v. Department of Interior*, 416 F.3d 1173, 1177-78 (10th Cir. 2005); *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003); *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987). One court stated:

Finally, I note that strong policy considerations support a fee waiver in this case. The legislative history discussed in *McClellan*, *supra* [cites omitted], and other cases demonstrates that Congress intended independent researchers, journalists and public interest watchdog groups to have inexpensive access to government records in order [t]o provide the type of public disclosure believed essential to our society. Moreover, in the 1986 amendments to FOIA, Congress ensured that when such requesters demonstrated a minimal showing of their legitimate intention to use the requested information in a way that contributes to public understanding of the operations of government agencies, no fee attaches to their request.

Institute for Wildlife Protection v. U.S. Fish and Wildlife Service, 290 F. Supp. 2d 1226, 1232 (2003). Accordingly, both the U.S. Court of Appeals for the Ninth Circuit and the U.S. Court of Appeals for the D.C. Circuit have stated that the main purpose of the fee-waiver is “to remove the roadblocks and technicalities which have been used by various Federal agencies to deny waivers or reductions of fees under the FOIA.” *Judicial Watch, Inc.*, 326 F.3d at 1311; see also *McClellan Ecological Seepage Situation*, 835 F.2d at 1284.

Given the “minimal showing” needed to obtain a fee waiver, and in light of NWEA’s recent experiences with EPA in other FOIA requests, EPA’s July 19 letter creates the appearance of arbitrary and capricious agency action. Indeed, it appears to NWEA that EPA may be using fee waiver denials to avoid the requirements of FOIA and President Obama’s Executive Order on FOIA. EPA’s July 19 letter in this matter reinforces our impression that EPA has denied our fee waiver request not because it needs more information but for some other reason. It also creates the impression that EPA has forgotten, or is ignoring, the reasons for the fee waiver provisions and the minimal showing needed to obtain a fee waiver. To avoid these problems, NWEA requests that in response to this letter EPA keep in mind that NWEA must only make a minimal showing to obtain the fee waiver.

NWEA appeals the denial of a fee waiver on the basis that it meets the EPA regulatory requirements. EPA regulations provide for a fee waiver to be granted when “a FOI Office determines, based on all available information, that disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 40 C.F.R. § 2.107(l)(1). As set out in EPA’s FOIA regulations:

To determine whether the first fee waiver requirement is met, FOI Offices will consider the following factors:

- (i) The subject of the request: Whether the subject of the requested records concerns “the operations or activities of the government.” The subject of the requested records must concern identifiable operations or activities of the Federal government, with a connection that is direct and clear, not remote.

- (ii) The informative value of the information to be disclosed: Whether the disclosure is “likely to contribute” to an understanding of government operations or activities. The disclosable portions of the requested records must be meaningfully informative about government operations or activities in order to be “likely to contribute” to an increased public understanding of those operations or activities. The disclosure of information that already is in the public domain, in either a duplicative or a substantially identical form, would not be as likely to contribute to such understanding when nothing new would be added to the public's understanding.
- (iii) The contribution to an understanding of the subject by the public is likely to result from disclosure: Whether disclosure of the requested information will contribute to “public understanding.” The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. A requester's expertise in the subject area and ability and intention to effectively convey information to the public will be considered. It will be presumed that a representative of the news media will satisfy this consideration.
- (iv) The significance of the contribution to public understanding: Whether the disclosure is likely to contribute “significantly” to public understanding of government operations or activities. The public's understanding of the subject in question, as compared to the level of public understanding existing prior to the disclosure, must be enhanced by the disclosure to a significant extent. FOI Offices will not make value judgments about whether information that would contribute significantly to public understanding of the operations or activities of the government is “important” enough to be made public.

40 C.F.R. § 2.107(l)(2)(i)-(ii). These are, of course, the relevant issues cited in your July 19 letter. And, as demonstrated below and in our July 17 FOIA fee waiver request, NWEA's request meets all of these criteria and so warrants a fee waiver.

A. Intent to Disseminate

EPA's denial of this fee waiver request is entirely unfounded. The original fee waiver request did, in fact, state an intent to disseminate the information sought. Additionally, it specifically stated that NWEA has an intent to share the records sought with nonprofit organizations and others who might be interested, including state agencies, federal employees, tribal governments, as well as representatives of municipal and industrial dischargers. The fee waiver request stated that NWEA

will also disseminate the records and/or its analysis of the records through the following means, as appropriate: through the internet from its website, through commentary to the press, through public forums in which it participates, in its newsletters, through emails to networks of organizations, and through formal public comments and other formal documents prepared for agencies.

EPA is well aware that if the documents are of interest to the general public and particularly if they are formal EPA documents, NWEA will post them directly on its website. For example, when EPA released otherwise difficult-to-attain letters in which EPA has authorized NPDES programs in states, NWEA posted them on its website, where they remain today. *See* NPDES Permit Program Authorization Letters, NWEA website, at <http://www.northwestenvironmentaladvocates.org/resources/NPDESPermitProgramAuthorizationLetters.htm>. Similarly, documents released by the State of Idaho are posted on NWEA's website where records requested from EPA with regard to water quality trading will also be posted. *See* Update #2, Water Quality Trading: Innovation or Hoax?, NWEA website at http://northwestenvironmentaladvocates.org/nweafiles/WQ_Trading/download_1/. In addition, NWEA makes EPA documents obtained through FOIA and other means available to the public and individuals through the use of Dropbox, an internet file sharing program.

This intent to disseminate is not a mere allegation. As the original fee waiver request stated,

NWEA has a track record of working with people as far away from Oregon as the State of Florida, including in New England, to assist them by conveying our understanding of EPA policies. NWEA is known for being generous with its time and information, despite its extremely limited resources. At a minimum, the audience for the information that NWEA has requested is environmental, fishing, tribal, and health organizations across the country which are interested in ensuring that water quality standards are sufficiently protective of human health, fish, and wildlife. More specifically, environmental organizations in Region I states are interested in water quality and its regulation. In the past, NWEA has shared similar information with state agencies, federal employees, tribal governments, as well as representatives of municipal and industrial dischargers. NWEA will continue to share such records as well as information analyzed from records with this same list of interests.

FOIA letter at 4.

In addition, the original fee waiver request stated that NWEA is involved in litigation regarding water quality standards. Use of information sought through FOIA is a recognized public use and benefit under FOIA's fee waiver standard. Courts have long recognized that the use of such laws to further the public interest through challenges to agency action may actually represent some of the highest and best application of public access laws. For example, the Ninth Circuit has ruled that a FOIA requester established a *prima facie* justification for a fee waiver when "[i]n particular, they made it clear to [the agency] that they meant to challenge publicly the scientific basis for the western pond turtle listing denial." *Friends of the Coast Fork v. U.S. Dept. of Interior*, 110 F.3d. 53, 55 (9th Cir.1997); *see also* *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 143 n. 10 (1975) (evidence of prior litigation interest does not decrease right of access under FOIA). Indeed, almost 30 years ago, the federal court for the District of Columbia, citing Supreme Court precedent, ruled that "[l]itigation to seek redress of violation of law is a right established by the first amendment . . . and restrictions thereupon are subject to strict scrutiny." *Idaho Wildlife Fed'n v. U.S. Forest Serv.*, Civ. No. 82-1206 (D.D.C. July 21, 1983) (citing *NAACP v. Button*, 371 U.S. 415 (1962)), Slip Op. at 7. In that case, the court rejected the Forest Service's denial of a fee waiver request because it relied on a regulation that proscribed such waivers whenever the information was "sought for use in litigation against the federal government." *Id.* at 3. The court ruled that such a proposition is "untenable" because:

The concept of the “private attorney general” is well-established, and certainly had its genesis in the environmental field. Indeed, when private litigation against a government agency vindicates a significant public policy and creates widespread benefit, policy encourages such litigation by awarding the plaintiff attorney's fees and costs.

Id. at 8 (citation omitted). The court noted that the Idaho Wildlife Federation “is a non-profit organization which states that its purpose in litigation against the Forest Service is to ensure compliance with environmental laws” and that “such activity would appear to be of the type generally considered to be public interest.” *Id.* Because policy-based disputes with agencies, as well as administrative challenges, “cannot be done completely without the ability to seek judicial review,” the court enjoined the Forest Service’s broad-brush rejection of fee waiver requests simply because they might interfere with an agency's unfettered pursuit of its agenda. *Id.* at 8-9. Indeed, litigation to enforce federal laws is an essential function of organizations, such as and including NWEA, which act in a watchdog capacity.

Given that the fee waiver request EPA denied explicitly stated an intent to disseminate the information to the public, we are at a loss as to understand what EPA is particularly driving at. Does EPA consider none of the people and organizations mentioned above to be the “public”? Did EPA not read the original request? We surely cannot disseminate that which we do not yet possess. Yet just as surely, NWEA has demonstrated that it has the capacity and intent to disseminate both the documents requested and the information contained therein. In fact, we would go so far as to say that NWEA’s intent to disseminate is greater than EPA’s own intent given that the Region I website is devoid of information on this topic including but not limited to the formal decision documents issued by EPA.

B. Whether the subject of the requested records concerns “the operations or activities of the government.”

As the original fee waiver request established, the documents requested have significant regulatory import, they are actions of the EPA, and they are not otherwise available to the public including NWEA. They concern the most obvious of government operations, decision-making pursuant to federal statute. We incorporate by reference the pertinent section of the original fee waiver request.

C. Whether the disclosure is “likely to contribute” to an understanding of government operations or activities.

The original fee waiver request established the important role of the requested documents in understanding what state rules are in place for purposes of the Clean Water Act. The original request also established that without the records, NWEA is unable to assess whether EPA Region I has complied with the Endangered Species Act (ESA). Because the ESA is intended to assure species on the brink of extinction do not get pushed over the edge and become extinct, compliance with that statute is important. Therefore, information demonstrating whether EPA has complied with the ESA will assuredly contribute to the public’s understanding of government operations and activities. NWEA currently is in possession of FOIA response documents that demonstrate the Region handles standards approvals and ESA consultation in a manner that is different from other EPA regions; NWEA cannot assess precisely how the region is handling the matter, or indeed if it is, without seeing the documents. Having such information is also

“meaningfully informative” in that it ensures NWEA does not engage in frivolous or unfounded litigation, that NWEA can help the public understand what is or is not happening to ensure the consistency of all regulatory programs with federal statutes, and it can demonstrate how water quality standards can contribute to the protection of threatened and endangered species.

While the formal documents requested may have been made public, all of them may not have been public and all of them are not currently available to the public. In addition, the documents have not been evaluated as a whole to determine EPA’s pattern and practice with regard to approval or disapproval of Region I states’ standards submissions. Thus, NWEA’s analysis of the requested records, particularly in light of the actions and policies of other EPA regions, will contribute something new to the public’s understanding of how EPA actions comport with the ESA. We hereby incorporate by reference the pertinent section of the original fee waiver request.

D. Whether disclosure of the requested information will contribute to “public understanding.”

As the original fee waiver request demonstrated, NWEA

will contribute to public understanding because the organization has expertise in this subject area of the records, an intention to disseminate the information obtained, and the connections with organizations and individuals across the country who are most likely to use the information contained within the records.

FOIA request at 4. NWEA is known nationally for its expertise on water quality standards and is often consulted by representatives of nonprofit organizations, dischargers, government officials, and agency staff and management. NWEA has sued EPA in a number of cases pertaining to water quality standards related to meeting statutory deadlines, arbitrary and capricious decision-making by the agency, and ESA consultation as well as with regard to EPA actions in programs intended to ensure that waters meet water quality standards, such as Total Maximum Daily Loads (TMDLs). NWEA has participated as a speaker in EPA-sponsored forums related to various standards issues, such as use protection and, most recently, lobbied on behalf of EPA’s proposed water quality standards regulations before the Office of Management and Budget. NWEA has prepared numerous comment letters regarding standards in states such as Oregon, Washington, and Florida.

As we previously demonstrated, NWEA is a public interest watchdog group that uses agency records that concern EPA policies and decisions to advocate for, *inter alia*, clean water by participating in the development of national policy through meetings and comment letters; by participating in the development of state water quality programs through advisory committees, comment letters, and other forms of advocacy (*e.g.*, encouraging state legislatures to not overturn water quality standards, participating in public hearings); by participating in the EPA review of aspects of state water quality programs through comment letters and litigation; and by participating in the development of a stronger national base of public participation to support effective water quality programs by sharing information in the form of memoranda with other public interest organizations, sharing litigation briefs and formal comment letters, participating in meetings, working one-on-one with other organizations, and posting information and EPA records directly to NWEA’s website. NWEA also frequently provides information and government documents to representatives of the media, both for background and for attribution. The print media are interested in the issues raised by NWEA including a recent lawsuit

concerning ESA consultation on EPA actions approving state water quality standards, the subject of this FOIA request. *See, e.g.*, “Lawsuit Filed to Compel 19-year-old Idaho Water Quality Standards for Toxics,” Idaho State Journal, at http://www.idahostatejournal.com/news/local/article_0cc12946-d87e-11e2-8e3f-001a4bcf887a.html; “Portland group sues to beef up Idaho toxics standards to help fish,” Idaho Statesman at <http://blogs.idahostatesman.com/portland-group-sues-to-beef-up-idaho-toxics-standards-to-help-fish/>; “Lazy USA Fails to Protect Salmon for 17 Years,” Courthouse News Service, at <http://www.courthousenews.com/2013/06/18/58586.htm>. We hereby incorporate by reference the pertinent section of the original fee waiver request.

E. Whether the disclosure is likely to contribute “significantly” to public understanding of government operations or activities.

Release of the records requested will contribute to the ability of nonprofit public interest oversight organizations such as but not limited to NWEA to oversee the activities of the EPA, its interactions with state regulatory agencies, and its compliance with federal statutes. Without the requested documents, NWEA cannot understand why Region I of all EPA regions has adopted different policies with regard to ESA consultation, whether that policy is consistent with federal law, and what actions Region I has taken on state water quality rules. As discussed above, NWEA participates in state rulemaking, in EPA review of state rulemaking, in permitting actions and the issuance of TMDLs, and in litigation. As stated in the original request, “[o]nly by understanding the EPA’s actions and inactions can NWEA meaningfully participate in its public oversight watchdog function and assist other organizations to do the same.” We hereby incorporate by reference the pertinent section of the original fee waiver request.

F. Commercial interests.

NWEA is a non-profit public interest environmental advocacy organization working to protect public health and the environment in the Pacific Northwest and across the country. Therefore, the considerations of 40 C.F.R. § 2.107(l)(1) with regard to the possible commercial interests of the requestor do not apply because NWEA has no commercial interests and will realize no commercial benefit from the release of the requested information or as a result of any subsequent analysis that we may perform on the records sought.

Conclusion

In conclusion, for the reasons set forth above and in the additional materials filed herewith, NWEA is clearly entitled to receive a public interest fee waiver for the above-listed FOIA request and hereby seek a reversal of the fee waiver denial made on July 19, 2013.

Sincerely,



Nina Bell
Executive Director